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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 308

JOHN DIOGUARDI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH E. BRILL,
Attorney for Petitioner,
John Dioguardi,
233 Broadway
New York, New York 10007

JOSEPH E. BRILL,
HENRY J. BOITEL,
JOHN L. POLLOK.

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IN THE

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October Term, 1969

No.

JOHN DIOGUARDI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, John Dioguardi, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on May 27, 1970 (Appendix C hereto, infra, p. A.18).

Citations to Opinions Below

The yet unreported opinion of the Court of Appeals, affirming the judgment of conviction herein, is printed in Appendix A hereto, infra, pp. A.1-A.15.

Jurisdiction

The judgment of the Court of Appeals was entered on May 27, 1970 (Appendix C hereto, infra, p. A.18). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

Petitioner was convicted of the substantive crimes of fraudulently transferring and concealing the property of a bankrupt in contemplation of bankruptcy, and of fraudulently concealing the bankrupt's assets from the trustee in bankruptcy in violation of 18 U.S.C. 152, and of participation in a conspiracy to do the same in violation of 18 U.S.C. 371.

The questions are:

1. Where the government, without prior notice to the defense, offers in evidence the statistical conclusions of a sophisticated computer as to essential facts in issue, is it a denial of the Sixth Amendment right to confrontation and a violation of the provisions of the Jencks Act (18 U.S.C. 3500), for the trial court to refuse defense access to the specially prepared program by which the computer arrived at its conclusions?

2. Accepting, *arguendo*, the finding of the Court of Appeals (contrary to the assertions of the Government and the finding of the trial court) that the computer's statistical computations were unnecessarily cumulative of other government evidence and peripheral to the controversy in litigation, a) was the denial of confrontation nevertheless *per se* reversible error; and b) was the use of such a sophisticated but "quite unnecessary frill" so prejudicial as to violate Fifth Amendment due process requirements?

3. The prosecutors engaged in the *ex parte* intimidation of their own witness during a recess. Later, under cross-examination, the witness denied that he had spoken to the

prosecutors during the recess. Was it a denial of due process and of confrontation for the Court to permit two unsworn prosecutors to advise the jury both as to the fact that such a conversation had taken place and as to the prejudicial content of that conversation?

4. Was the testimony of one of the defendants, who was the chief defense witness in this conspiracy trial, unfairly disparaged, in violation of the requirements of due process, by a) the trial court's prohibition and comments when defense counsel sought to have the witness-defendant address himself to the charge of the indictment; and b) the trial court's charge to the jury which pointedly, unnecessarily and at length singled this witness-defendant out as having a motivation to lie under oath since he had an interest in the outcome of the proceeding?

5. Where the Petitioner has been notoriously and disparagingly publicized under an alleged alias, both in the matter on trial and in various unrelated matters, and where, as noted by the Court of Appeals, there was no purpose served by reference to that alias, was it prejudicial error for the trial court to deny defense motions that the alias be stricken from the indictment and not used at trial?

Constitutional Provisions and Statutes Involved

This case involves the Fifth Amendment (due process of law) and the Sixth Amendment (right to an impartial jury and to confrontation with witnesses) of the United States Constitution.

The Federal statutory provisions involved are: 18 U.S.C. 152 (bankruptcy fraud), 18 U.S.C. 371 (conspiracy), and 18 U.S.C. 3500 (Jencks Act—production of statements and reports of government witnesses).

These constitutional provisions and statutes are reproduced in Appendix D hereto, infra, at pp. A.20-A.25.

Statement of the Case

Preface

This statement of the case is set forth in three parts. Part I (infra, pp. 5-10) contains those facts thought to be necessary for an understanding of the controversy which led to this prosecution.

Part II (infra, pp. 11-19) contains a review of the evidence elicited in support of the chief issues at trial. That section anticipates the possibility that this Court may view the questions presented as being substantial only within the context of a truly arguable controversy for the jury's resolution. Our concern is occasioned by the abbreviated facts found in the opinion of the Court of Appeals, which sets forth the theory upon which this case was prosecuted (infra, A.2-A.6).

Part III (infra, pp. 20-31) contains those facts which are immediately material to a consideration of the questions presented.

PART I—Outline of the Case

A. The Indictment

The indictment was filed on April 21, 1966, and charged four individuals and one corporation with the continuing crimes of: 1) fraudulently transferring and concealing property in contemplation of bankruptcy since October, 1964; 2) fraudulently concealing assets from a trustee in bankruptcy since March 2, 1965; and 3) conspiracy to commit these crimes since January 1, 1964.

The defendants named in the indictment were Petitioner John Dioguardi; his son, Dominic Dioguardi; Thomas Plumeri; David Perlman; and a corporation, First National Kosher Provisions, Inc. [*First National*]. The bankrupt was Consumers Kosher Provisions, Inc. [*Consumers*]. A third corporation, not named in the indictment, but of central importance to the Government's case, was American Kosher Provisions, Inc. [*American*].*

B. The Controversy

The evidence was primarily concerned with the activities of the three above noted corporations, which were engaged in the highly competitive industry of manufacturing and wholesaling kosher delicatessen products.

The defendants John Dioguardi and Thomas Plumeri were employees of Consumers; David Perlman was a stockholder, as well as president. Consumers' stockholders

* Dominic Dioguardi was acquitted by the jury upon each of the counts of the indictment. At the trial, all of the defendants, except Perlman, were represented by the same counsel. We are advised that Plumeri and First National are petitioning this Court for Certiorari by separate counsel.

owned a number of subsidiary corporations, and one of these was defendant First National, which had been created some years before for the sole purpose of protecting one of the brand names used by Consumers (R. 1533-1537).

In the summer of 1964, Consumers was in debt to its suppliers for approximately $130,000, and its equipment was antiquated. It appears, however, that, over the years, it had amassed a substantial amount of good will among retail outlets, due to the quality of its product and its customer policies.

American was a strong rival of Consumers. In August, 1964, for the ostensible purposes of acquiring Consumers' excellent customer routes and of eliminating a competitor, American entered into a contract whereby it agreed, *inter alia*, to purchase Consumers and Consumers' subsidiaries by an exchange of stock and an assumption of Consumers' debts (Government Exhibits 1, 2, 3, 4; R. 426-429). The closing was to be held two months later, in October, 1964. In the interim, the operation and control of Consumers was turned over to American, literally lock, stock and barrel. There only remained the legal transition of title at the closing.

Although the parties met on the appointed day, the closing failed to materialize due to an alleged breach of contract by the Consumers group concerning the production of certain stock certificates. American refused to adjourn the closing even one day in order to give Consumers an opportunity to remedy the breach (R. 445-448; 1527-1569). On the following day, October 28, 1964, American announced that it would return the production plants, and the merchandise contained therein, to Consumers' stockholders during the early morning hours of October 29 (R. 454-455).

Faced with this turn of events, Consumers' stockholders met on October 28 with their attorney (Brown) and with their two principal employees, John Dioguardi and Thomas Plumeri.

Brown, who testified as a defense witness, gave evidence of critical importance concerning that meeting. It is clear that the basic foundation of the course of action which the Government chose to characterize as criminal, had its source in the good faith advice given by a lawyer to his clients.

Brown advised that continuation of business within the Consumers corporate structure would be pointless, since Consumers was clearly headed for financial ruin due to its crushing indebtedness. He suggested that any further business be conducted within the corporate framework of First National, which, theretofore, had been nothing more than a corporate shell. He also advised that First National could use the returned assets of Consumers, as long as a record was kept for the purpose of reimbursing Consumers. Since Consumers' plants were owned by a third, related corporation, they were unencumbered by Consumers' debts. Lastly, Brown advised that a meeting of Consumers' creditors should be called to inform them of the recent developments and to determine what course of action should be taken. The attorney's advice, as above outlined, was adopted and implemented by the stockholders (R. 1571-1577).

On the following morning, and under circumstances contested at trial, the plants and inventory were returned to Consumers, and all further business was done under the corporate structure of First National. A few days later, on November 6, 1964, Brown, as attorney for Consumers, notified the creditors, by mail, that a creditors' meeting would

be held on November 27, 1964. At trial, he testified, without contradiction, that he advised the creditors of the developments noted above, including the fact that First National was using Consumers' returned inventory (R. 1583-1584). A creditors committee was formed, and, significantly, its chairman was later appointed co-counsel to the subsequently named trustee in bankruptcy.

In January, 1965, the creditors committee met again, and received an independent accountant's report which it had commissioned at the November meeting. Based on that report, it was decided that an involuntary petition in bankruptcy should be filed. At the same time, the accountant requested payment, in the amount of $1,000, for the work he had done. The creditors asked Brown if First National had yet used a sufficient amount of Consumers' inventory to warrant such a payment. In their presence, Brown called the Petitioner, Dioguardi, and put the question to him. Dioguardi responded that sufficient funds were available, and Brown so informed the creditors (R. 1593-1594), and the bill was, in fact, paid within five days. Present at this meeting were both of the attorneys who subsequently became counsel to the trustee in bankruptcy, one of them being the trustee's law partner (1194-1198, 1589-1590).

The petition in bankruptcy was filed against Consumers on January 25, 1965, and the trustee was appointed on March 2, 1965 (R. 1179-1180). The bankruptcy schedules were prepared by one of the trustee's attorneys, were signed by the defendant Perlman, and were filed on June 24, 1965 (Gov. Ex. 36, R. 1219, 1890-1893, 1899, 1626-1629). Perlman was President of Consumers and Vice President of First National.

The bankruptcy schedules were, perhaps, the most revealing exhibits of the trial. Significantly, the schedules stated that, as of January 25, 1965, the value of the returned inventory was $33,894.01, which is the same value assigned to the inventory by American, and which, by the Government's admission, improperly included approximately $1500 worth of materials that had *not* been transferred to Consumers (R. 819). The schedules illustrate two independent but equally important facts: 1) the attorney for the trustee was fully aware of the value of the inventory which had been returned to Consumers, since he is the one who prepared the schedules; 2) the defendants could hardly have been conscious of a misappropriation, or intent upon concealing it, if they paid so little attention to the bankruptcy schedules as to admit the receipt of the inflated amount. It should also be noted, that the indictment and the Government's theory at trial, both claimed that this inventory had been concealed through the date of the filing of the indictment, April 21, 1966. This was the only inventory in the case.

C. Summary of the Contested Issues at Trail

As noted by the Court of Appeals, the Government's theory at trial was that ". . . defendants deliberately aborted the closing and then helped themselves to Consumers' property." (A.6). The bottom line of that theory was that the defendants had concealed Consumers' assets by not fully revealing their existence, first to Consumers' creditors, and then to the trustee.

It should be noted that no one testified at the trial that any of the defendants had plotted to defraud; or had

admitted an attempt to defraud; or had performed affirmative acts of concealment; or had instructed anyone to conceal any facts.

By documentary evidence and sworn testimony, including that of Consumers' attorney, the attorney for the trustee in bankruptcy, and the defendant Plumeri, the defense acknowledged all of the facts recited, at pages 5-9, *supra*, and contested every element of the Government's theory. That theory was as follows:

(1) The defendants wilfully aborted the closing with the intent of perpetrating the alleged fraudulent concealments;

(2) The value of the inventory returned by American to Consumers was $32,000;

(3) The defendants utilized the returned inventory in the operations of First National (the issue at trial was not whether such inventory was used, but rather, the quantity and value of that which was used).

(4) The defendants conspired to and did conceal the extent of such use, in violation of the bankruptcy laws.

Part II of this statement of facts, which immediately follows, discusses the above contentions in some detail, so as to make clear that the jury's determination of guilt could well have been the result of the trial court's resolution of the questions presented for review.

PART II—The Chief Factual Issues At Trial

A. Responsibility for Failure of the Closing

The government urged that the defendants aborted the agreement by wilfully breaching the requirement that all of the Consumer stock be negotiated to American on the day set for closing. The difficulty arose over two certificates, each for 27½ per cent of the stock.

It was uncontradicted at the trial that the failure to produce one of these certificates was due solely to certain sluggish procedures of the New York Surrogates Court. It had belonged to the recently deceased president of Consumers, and was inaccessibly situated in a bank safe deposit box, pending court authorization to the widow, who was a signatory to the agreement and was present at the closing. Consumers' attorney arrived at the closing with information that the authorization was imminent, and that an adjournment for a day or so would see the problem solved (R.1552-1556). As it turned out, he was right. The authorization was issued and the certificate was obtained by the following morning. It was immediately tendered to American, but to no avail, since, on the prior day—the day of the closing, American's president had decided that the closing would not be adjourned even one day beyond that set by the contract (R.1567-1569).

At the closing, it was discovered that a second certificate, previously thought to have been retired, and therefore not mentioned in the contract, had been negotiated to Morris Meat Market, Inc., many years before. Morris was no stranger to American, since it was owned by the same stockholders who owned Consumers, and was a party to the

contract. By the contract, American gave five years free rent to Morris, and Morris promised to purchase all of its delicatessen meats from American for the same period (Gov. Exhibit 1).

When both sides discovered the problem, Consumers' attorney suggested that since all of the Morris stockholders were present, they could simply negotiate the certificate to American. American responded that this might render Morris insolvent since Morris carried the certificate on its books as a substantial asset. The record is clear that this reply, although technically correct in a "paper" sense, was factually groundless. American's own auditors had reported that Consumers' stock was worthless; its current liabilities exceeded its current assets by approximately $142,143.34, and its capital account showed a deficit of $199,545.34. Whatever value Morris' books assigned to the stock was meaningless.

As an alternative, Consumers' stockholders agreed to reduce proportionally their individual receipt of American stock, with the remainder to be put in the name of Morris, thus providing substantially more than a *quid pro quo* by substituting a concededly valuable asset for a concededly valueless one. American rejected this out of hand, without any explanation.

American's counter-proposal for both of the problem certificates was that a bond be immediately posted for twice their mythical value. Consumers was not able to comply, and American took advantage of the above technical breaches to void the contract, claiming that even a day's delay in the closing would violate American's oral statements to some of Consumers' creditors that they would

know by this day whether American would be paying Consumers' past due bills (R.1552-1556).

The Government's claim that the defendants wilfully aborted the contract, as part of this alleged conspiracy, is all the more strange in light of the testimony of its own lead witness, Comptroller of American. He testified that Petitioner John Dioguardi had remained with him until the wee hours of the morning, trying to convince him that the contract should be saved and the closing should be completed on an adjourned date (R.450-452).

At trial, the defense argued that the realities of the situation were clear. American's purpose in seeking to purchase Consumers concededly was to eliminate its competitor and to capture its customers. During its custody of Consumers, American ran Consumers into the ground by producing an inferior product, and by abrogating the long standing policy of Consumers to accept any and all returns from customers. Having thus struck the death blow to their main competitor, the lame excuses at the closing were simply a device to throw the carcass to the wolves. There was nothing more definite than that Consumers would never open its doors again.

B. The Degree of First National's Use of Consumers' Assets; Quantity, Value and Offset.

1. American's Claim as to the Value of the Returned Assets.

American moved with dispatch in effectuating its determination to sever its relationship with Consumers. On October 28, 1964, while Consumers was still trying to revive the closing, American advised Consumers to have its repre-

sentatives at the plant during the early morning hours of the following day to accept return of the plant and of the inventory contained therein (R.613).

Having been thus advised, the Consumers group met with their attorney and formulated the plans to activate First National. They had to face three problems occasioned by this sudden turn of events: What was to be done with the perishable inventory that would be returned on the following morning? What should be told to the production, sales and delivery personnel who would be reporting for work on the following morning? How could uninterrupted service be given to Consumers' customers?

It was resolved that the only solution to these problems would be to commence operations immediately upon the return of the inventory.

On that same day, three of American's employees conducted an *ex parte* inventory of the raw meat, spices, finished products, and packaging materials which would be left in the plant when it was turned over to Consumers (R.607).

During the early morning hours of the following day, representatives of the two groups met at the plant, and the defendant Plumeri was asked to sign the already completed inventory sheets (Gov. Ex. 7 series). At trial, he testified that, due to clear defects in the inventory, he refused to sign the sheets. He was then told that if he did not sign the sheets, his delivery men would not be permitted to load their trucks and start their rounds. He commenced making a spot check, but since the delivery men had arrived, and since it was necessary to commence production, he discontinued, and signed the sheets under protest, noting the legend "To Be Recounted" on the top sheet. (R.2322-

2328; 2337-2356; 2665-2671; 2716-2757; 2785-2788; 2912-2913).

American's representative, who testified for the government, gave substantially the same account of events, except that he claimed Plimeri had participated in a recount of the inventory, and had agreed to its correctness. The witness claimed that the legend on the first sheet applied only to that sheet, although he conceded that many of the items had been counted by means of estimate, rather than actual count. (R.613-617; 648-655; 680-689).

Following the above, American's representatives left the plant. On a later date, they created a new inventory list, *ex parte*, which assigned values to the allegedly returned inventory (Gov. Ex. 10 series). Admittedly, that list contained at least $1,500 worth of materials which had *not* been returned to Consumers. It is also of note that, upon assuming control of Consumers, American had done an inventory, and had assigned values to the various items of merchandise. A comparison of the two inventories, at trial, revealed that the identical items were priced substantially lower on the opening inventory than on the outgoing inventory (Ex. 10 series) (R. 752-774; 875-877).

Using the prices thus assigned by American, and making allowance for the admitted overstatement of certain items, but not for the overpricing, the Government claimed that over $32,000 worth of inventory had been returned to Consumers and used by First National.

2. The Government's attempts to corroborate American's claim.

In an attempt to bolster the questionable validity of the Government's Exhibit 10 series, the Government called two FBI agents as witnesses.

The first was Frederick J. Lonergan (R.1304, *et seq.*), who was neither a certified nor licensed public accountant (R.1325).

Since First National had taken an inventory of its stock on November 27, 1964, Lonergan reasoned that an analysis of its raw meat purchases and product sales from October 28th (the date that Consumers' inventory was returned) to November 27th, would reveal just how much of Consumers' inventory First National had received.

Information concerning product sales was taken from First National's sales slips, which only listed weight, and not price. Information concerning raw meat purchases was taken from First National's purchase journal. He totaled the gross weight of the November 27th inventory, of the sales, and of the raw meat purchases, and his computations produced the following results:

Oct. 28–Nov. 27	product sales	105,648 lbs.
Nov. 27	inventory on hand ..	+42,679 lbs.
	total	148,327 lbs.
Oct. 28–Nov. 27	raw meat purchases ..	—108,475 lbs.
	unexplained excess ..	39,852 lbs.

He then totaled the weight of the products listed on Exhibits 10a and 10b, and found that came to 25,569 lbs. He thus reasoned that the unexplained excess left ample room for the total quantity of inventory which had allegedly been transferred by American. He could not explain why there was still another 14,000 pounds of meat unexplained (Gov. Ex. 41; R.1319-R.1323).

On cross examination, the defense established the limitations of Lonergan's analysis. All he had done was to compare the weight of raw meat which came into the plant to the gross weight of products which were in inventory or which had been shipped out of the plant to customers. In doing so, he had not made any allowance for the additional ingredients (including a substantial amount of water) which were contained in the finished products and he did not know what percentage of meat was contained in the finished products (R.1336-R.1340). Likewise, although he had seen credit memos among First National's records, he disregarded them and thus did not take into account what effect returns of merchandise by customers would have upon his computations (R.1384). Finally, he admitted that he did not know of his own knowledge whether, in fact, American's figures as to what it had transferred to Consumers, were correct (R.1333-R.1335, R.1387-R.1388).

The second FBI witness was a computer expert, whose testimony is more fully detailed, *infra*, at pages 19-22, since it directly relates to one of the questions raised in this petition. In brief, he testified that, using the same raw information which had been used by Lonergan, the Computer had concluded inventory, alleged to have been returned to Consumers, was exhausted by First National on November 5, 1964 (R.1437-R.1438).

3. The Defense

The defense sought to establish that the total amount of consumers' inventory used by First National amounted in value to $16,310.28 (R. 3088). That was approximately one half of the value alleged by the Government. The figure was arrived at by an exhausive analysis of purchase and

sales invoices, done by a certified public accountant who testified at the trial (R. 2982 *et seq*). It will be recalled that the Government relied solely upon delivery slips and the purchase journal to arrive at its computations.

By the testimony of Thomas Plumeri, corroborated by the certified public accountant, Laskow, the defense established, without contradiction, the essential falacy of the Government's computation theory. Without any allowance of any type, the Government's figures simply compared the apparent gross weight of raw meat purchased to the apparent gross weight of products sold. Thus, the increased weight which followed from the addition of water, spices, and other ingredients, was counted as meat in the Government's computations.

It was without contradiction that First National had: (1) paid certain of consumers' bills amounting to $4,504.41; (2) paid $1,000.00 to the accountant who had been hired by the creditor's committee; (3) had accepted back from customers $4,245.69 worth of spoiled merchandise which had been sold through consumers prior to the commencement of the First National operation; (4) had, at least since December, 1964, recorded on its books a debt to consumers in the amount of $5,523.00.

By crediting the above against the amount of consumers inventory which the certified public accountant had verified was all that was used by First National ($16,310.28), the balance owing was $1,037.18. (R. 3088-3090) Significantly, if one more item were credited, a Consumers' electric bill which had been paid by First National, the balance would be reduced to $565.53. The electricity credit was, however, excluded due to loss at trial of the check receipt (R. 3083).

Thus, by the Government's value computations, which were completely the result of American's *ex parte,* unaudited claim as to returns, the defendants had wrongfully concealed over $32,453, worth of merchandise; by the defense computations, attested by a certified public accountant, the amount used but not accounted for was slightly more than $1,000.

Together with the degree of conceded revelation (to the creditors, the attorneys for the receiver, the First National accountant, and via the schedules in bankruptcy), and dependence upon the advice of their attorney, the defense advanced the above low figure in support of its argument that no intent to concel assets existed.

PART III—The Context Of The Questions Presented

A. Government Use of the Computer Proofs

In support of its essential theory that First National used far more of Consumers' inventory than it paid for, the Government called, as a witness, Maurice F. Row, who is in charge of the computer department of the FBI.

After providing an impressive recitation of his background in the use of computers (R.1425-1427), he testified that the FBI owned two IBM 360, Model 40 computers, each having a capacity to store 256,000 characters of information (R.1428).

His department was given First National's numerous delivery slips, and the weight information from each of these slips was recorded on IBM tabulating cards—a separate card for each slip (R.1428). The same was done for the information on the Government Exhibit 10 series, which was American's alleged inventory sheets.

A series of programs were then written for the computer, each program telling the computer to arrive at different items of information after examining the tabulation cards. The accuracy of the print-outs, thus produced, depended upon the correctness of the program, as well as the correctness of the information recorded on the tabulation cards. Apparently, the person responsible for the creation of these materials was someone other than Mr. Row (R.1434, 1450-1451, 1453, 1455). Defense demands for the production of the computer programs under 18 U.S.C. 3500, were denied by the Court, as were motions that Row's testimony and the computer print-outs be stricken (R.1429-1430, 1457, 1459).

Following the various specially prepared programs, the computer examined the numerous IBM tabulation cards and

produced the following print-outs which were received in evidence over objection:

Gov. Ex. 42: A listing, segregated by product, date and invoice, showing the sales which had been made by First National (R.1433-1434).

Gov. Ex. 43: A summary, by day and week, showing First National's sales (R.1435).

Gov. Ex. 44: A calculation, using the Gov. Ex. 10 series, of the daily sales for each day (R.1436-1437).

Gov. Ex. 45: A calculation, showing, for each day, the inventory balance, the raw materials purchased, the sales of finished products, and the balance of initial inventory remaining each day. According to this exhibit, the total poundage of inventory, alleged to have been returned to Consumers, was exhausted by First National on November 5, 1964 (R.1437-1438).

On cross-examination, Row admitted that the computer print-outs did not take into consideration any information concerning returns, or spoilage, or weight increases sustained by the raw meat during manufacture by the addition of other ingredients (R.1442-1443).

Row was the last witness of the day. Immediately upon the resumption of proceedings the following morning, the defense again moved for the production of the computer programs pursuant to 18 U.S.C. 3500. The motion was again denied upon the ground that such a program is not a statement within the meaning of that statute (R.1468-1474).

The defense then moved:

> "... to strike the testimony of the witness Row and Exhibits 42 through 45, inclusive [the computer print-outs] introduced on his testimony on the ground, among

> others, that this testimony is based upon hearsay evidence of a mechanical or an electronic computer which was not itself subject to cross-examination, thereby denying the defendant the constitutional right of confrontation and cross-examination, and to instruct the jury to disregard his testimony and the exhibits introduced thereunder."

The motion was denied by the Court (R.1477).

In his summation to the jury, the prosecutor argued:

> "The study that was made by the FBI computer shows clearly that they were selling a lot more stuff than they were able to produce even with the machinery of Consumers. There were selling a lot of it. It was rolling out of there to Consumers' customers." (R.3463).
>
> * * *
>
> "The FBI computer sheet shows that all the finished product which existed at the time, 25,569 and a half pounds, was exhausted by November 6th of 1964, working that study on the basis, as Mr. Thomas Plumeri said, in the meat industry, the first in is the first out." (R.3467).

B. The prosecutors' intimidation of their own witness, and the Court's directive, in the midst of trial, that the prosecutors give an unsworn and highly prejudicial recitation to the jury concerning a misstatement of that witness.

The first prosecution witness was Sol Alpert who was American's comptroller during the period with which this case is concerned. He had participated in the negotiations which led to the buy-out contract, in the determinations concerning Consumers during the management period, and in the events on the day of the closing.

Alpert's testimony was interrupted by a luncheon recess. That afternoon, on recross examination, defense counsel asked him if he had had a conversation with any of the members of the prosecution's staff during the luncheon recess. He responded that he had not had any conversation. When pressed, he stated that if he did have such a conversation nothing was said other than that he asked one of them when he would be able to go back home to Miami. Recross examination then continued and was completed. Redirect examination by the prosecution followed.

At the end of redirect examination, one of the prosecutors, Mr. Obermaier, requested permission to approach the side bar. At the side bar he advised the Court that he had spoken to Alpert during the luncheon recess and had told Alpert "... that I thought he had omitted purposely much important information on his direct examination, that he sounded more like Mr. Brill's [defense counsel] witness than he did our own." (R.577). He went on to say that he also had another conversation with Alpert during the recess in which Alpert asked him to sign a witness sheet which would authorize payment to Alpert for the costs of his trip to New York.

The second prosecutor, Mr. Goldberg, then advised the Court that he, too, had a conversation with Alpert during the luncheon recess in which "I specifically asked him why he did not mention the surety situation, and he had indicated to me that he thought I had suggested to him that in his testimony, he should only cover the high points and that the surety should be omitted."

The Court then asked defense counsel if the defense wished "to bring this out". Counsel responded that in view of what had happened, the defense was entitled to a hearing on this question out of the presence of the jury. Defense counsel also

sought to advise the Court as to the reason that the defense had raised the issue in the first place, but the Court, although this was at the bench, would not permit him to do so. The Court denied the application for a hearing and insisted that defense counsel make a choice as to whether the information in question should be revealed to the jury or not. Defense counsel stated that he could not make that determination unless a hearing were first held.

The prosecutor suggested that the witness simply be asked if it were a fact that he spoke to the prosecutor. (581). Defense counsel suggested that the question be deferred so that co-counsel could discuss it and reach a conclusion. The Court adopted neither suggestion, and what follows occurred in open Court before the jury.

The Court directed Mr. Obermaier, one of the prosecutors,

> "To state in the presence of the jury his recollection of what transpired this afternoon in the corridor between the witness and himself, and I will now ask him to do that and limit himself to that. It will be a statement of his recollection."
>
> Mr. Obermaier: "It is my recollection that at the luncheon recess, I spoke with Mr. Alpert outside this room by the elevator, and I said to him that I thought that he had purposely omitted important testimony, damaging against the defendants, and that he sounded on cross examination more like Mr. Brill's witness than the government's witness.
>
> "Mr. Goldberg recalls the conversation at the same time in which Mr. Goldberg said to Mr. Alpert that he had omitted the testimony concerning the surety bond, to which Mr. Alpert responded that he had done this because he thought the testimony should only cover the highlights.

[Colloquy]

> "The only other conversation I had with Mr. Alpert was during the recess that was declared this afternoon at approximately 3:30. I signed a witness form authorizing a payment of the statutory fees for witnesses who come from other states, and I asked him whether he had a reservation to return to Miami, and he said he did not."

The other prosecutor, Mr. Goldberg, then addressed the jury as follows:

> "If your Honor please, I think that with respect to the conversation which I had with Mr. Alpert, it is my recollection outside of the courtroom this morning that I had inquired of Mr. Alpert why he did not mention the surety bond situation. Mr. Alpert replied that he thought that I had suggested to him not to mention that particular element and that I only wanted the highlights or capsulized form.
>
> "I suggested to him that I had not so said that to him, but that it was true that I wanted him to give on his testimony the highlights of what occurred at that meeting, and that if Mr. Brill wished to bring up the surety situation, that was up to him. That is the extent of my conversation."

The Court then asked Alpert if, after reflection, he recalled the conversations as being the same or substantially the same as what was described by the prosecutors. The witness responded "This may have taken only two and a half seconds or two and a half minutes, but I would imagine it is substantially about what they may have said."

All of the above having taken place over the objection of defense counsel, the defense moved for a mistrial, which was denied (R. 586-587).

C. The Court's disparagement of the testimony of the defendant-witness Thomas Plumeri.

Plumeri was the only one of the defendants who testified at trial. He was called to the stand in his own behalf and in the behalf of his codefendants. He and Petitioner Dioguardi were represented by the same attorney. Our point III, infra pp. 45-50, argues that the trial Court committed prejudicial error, first in preventing Plumeri from directly addressing himself to the charge of the indictment during his testimony, and then during the charge to the jury in its comments concerning Plumeri's credibility.

A. During Plumeri's direct examination, Defense Counsel formulated the language of the conspiracy count of the indictment into a question and asked Plumeri, "I ask you, Tom: Did you do that?": Plumeri replied, "No, sir." (R. 2638-2639-A). No objection was made by the government during or after the asking of the question and the giving of the answer. Following the answer, the Court saw fit to hypothesize an objection, and exclaimed, "Sustained. You know that kind of question is improper." (R. 2640). Defense Counsel replied that he had "been permitted time after time by judges in this court to ask such a question as a direct denial of the allegations of the indictment", and there then followed this colloquy:

> "The Court: He has pleaded not guilty.
>
> "[Defense Counsel]: He has pleaded not guilty and I am asking him substantively now if he did what he is charged with doing. Does your Honor say that I may not ask him whether he did or did not do the things alleged in this indictment?

"The Court: I am saying that is unnecessary to do. This is a conclusion. The reason we are here is to listen to evidence." (R. 2640).

Defense Counsel was then permitted to ask Plumeri several questions addressed to his intent to commit the crimes charged in the indictment, and the following then occurred:

"Q. Did you knowingly and intentionally conceal any assets from the trustee in bankruptcy of Consumers Kosher?

"[Prosecutor]: I object to this as repetitious.

"The Court: Overruled.

"A. No, sir.

"The Court: It is a conclusion but I will overrule the objection.

"[Defense Counsel]: I respectfully except to your Honor's remark.

B. Toward the end of its charge to the jury, the Court instructed the jury on the issue of credibility. We here reproduce the Court's entire charge in this respect:

"In this case, the government called nineteen witnesses and the defendants nine witnesses to give testimony before you with respect to various issues before you, and you are required, of course, to determine the credibility and the weight to be given to their testimony.

"The question of the credibility of each witness is for you alone to determine. It is up to you to decide what part of the evidence you believe and what part, if any, you choose to reject.

"How do you determine the credibility of a witness? How do you determine the weight to be given to his or her testimony?

"You just use your plain everyday common sense.

"I have noticed that you carefully observed each witnesses manner in giving his or her testimony and what he or she had to say.

"How did his or her story impress you? Did he or she seem to you to be testifying frankly or unfrankly?

"The answer to that question depends on your applying your common sense and experience just as you would do in your own life if you were called upon to decide whether you had been given a true picture with respect to a matter was of importance to you. To use the vernacular, you size up each witness, you consider his demeanor, candor or lack of it, his possible bias, his means of information, the accuracy of his recollection, and you may consider whether his testimony appeared to be supported or contradicted by other credible evidence or testimony.

"You may consider whether a witness has a possible interest in the case or a motivation to lie or to testify favorably or unfavorably for one side or the other, *such as an interest in the defendant or an interest in an employee of a defendant.*

"*In this case, for instance, the defendant Plumeri has taken the witness stand and testified in behalf of the defendant. It is proper for you to consider the personal interest which he has in the outcome of this criminal proceeding against him in determining the extent to which his testimony is worthy of belief.*

"*Interest can create a motive to falsify or color testimony, and the greater the interest the stronger is the temptation to do so. The interest of a defendant in a criminal case is of a character possessed by no other interest, and is therefore a matter which might affect his credibility.*

"*Another matter that may be considered by you in appraising the credibility of a witness is whether he has ever been convicted of a crime and whether he has*

made any prior statements that are inconsistent with his testimony here.

"*In the present case, for instance, there was evidence that the defendant Plumeri had been convicted of possession of policy slips in the State of New York.*

"Various witnesses on the stand have been faced with prior testimony which claimed to be inconsistent with certain matters testified to them here.

"Likewise in considering the testimony of Government Agents and employees that was adduced here, you should bear in mind the fact that because they are government employees or agents does not entitle their testimony to any greater weight than the testimony of any other witness. You apply the same tests in determining their credibility as you would in determining that of any other witness.

"You may also consider the character of the witness, what sort of person each witness is, whether he or she appears to you to be inherently believable or not.

"Although the matters I have just mentioned are factors that you may consider in determining the credibility and weight of each witness' testimony, the fact that a witness has a personal interest or has been convicted of a crime or may have made some prior inconsistent statement, does not necessarily mean that he is therefore testifying falsely here.

"If, however, you find that any witness in this case has intentionally given false testimony with respect to a material fact, you may disregard that part of the witness' testimony that you find to be false or you may disregard all of his testimony, or you may accept that part which you believe or find to be reliable and disregard the balance.

"If you find that a witness has been discredited or impeached, partially or wholly, for any of the reasons I have indicated, to sum it up, you may give his testimony such credence as you think it deserves." (62-A-65-A).

D. Prejudicial Use of the Petitioner's Alleged Alias.

The indictment in the present case identifies the Petitioner as "John Dioguardi, a/k/a Johnny Dio". As can be gleaned from the various newspapers and other publications which formed a part of the defense pre-trial motions, the shorthand expression, "Johnny Dio", appears to be of appealing use to the press, perhaps because of its more convenient use in headlines. This was made clear in newspaper accounts prior to (R.3977-4004) and during (e.g., R.287, 727-734, 738-740) the trial.

Prior to trial, the defense had moved for a continuance or, in the alternative, a change of venue from the Southern District of New York, upon the ground that an inordinate amount of hostile publicity attached to the Petitioner. The voluminous motion papers were supported by extensive documentation. Included in that documentation was a report, dated October 2, 1967, based upon a survey of a scientifically selected cross-section of adult residents in the Southern District of New York. The finding of that survey was that 32 percent of those interviewed identified the Petitioner with crime, and/or said he was guilty (R.4115-4123).

The above motion having been denied, the defense also moved before trial, and before the same judge who presided at the trial, for an order that the name "Johnny Dio" be stricken from the indictment, and that the prosecutor be instructed not to make any reference to that alias during the trial. The motion was denied (R.4174-4178).

The fears of the defense were verified during the extensive *voir dire* of prospective jurors. The following cited references reveal that all, except three, of those prospective

jurors who admitted recognizing the name of the defendant, recognized it under the alleged alias, rather than under his true name, and most of them had heard it associated with crime. Of the three exceptions, one was an attorney, who, no doubt, used the Petitioner's true name out of a sense of propriety (R.337); the second personally knew the Petitioner's brother (R.340-341); and the third referred to the Petitioner by a combination of both names, i.e., "Johnny Dioguardi"-(R.346). (R.32-4, 35-6, 39-41, 44-6, 49, 56, 105, 109, 110-112, 118-121, 123-124, 127-8, 136-7, 138-9, 139-141, 146-8, 166-7, 174, 178, 180-1, 209, 214, 227-8, 232-3, 240-2, 260-1, 266-271, 278-280, 284-285, 287, 303, 305-9, 322, 324, 330, 337, 340, 340-1, 346, 350-51)

There was no witness who testified at the trial who required the use of the alias to identify the Petitioner, and there was no evidence of any type with which that alias was connected. Nevertheless, both the Court and the prosecutor utilized it in questioning witnesses (e.g., R.429,431, 433,1165).

During the course of its deliberations, the jury requested a copy of the indictment. Defense counsel requested that the alias be stricken from the document before it was sent to the jury. The application was denied (R.3625-3627).

ARGUMENT

POINT I

The trial court refused to grant the defense any opportunity to see and examine the specially prepared programs by which a sophisticated computer arrived at statistical conclusions which were placed before the jury in support of the prosecution's theory concerning the essential facts in issue.

That denial deprived the Petitioner of his rights under 18 U.S.C. § 3500 and under the Sixth Amendment.

Assuming, *arguendo*, that the testimony produced by the computer was cumulative and peripheral, the denial of confrontation nevertheless constituted reversible error.

Assuming, further, that the computer's statistical computations were a "quite unnecessary frill" to the prosecution's case, then such pointless use of impressive equipment constituted a violation of Fifth Amendment due process requirements.

The factual support for this issue is found in our Statement of the Case, *supra*, at pp. 20-22, and it is dealt with in the opinion of the Court of Appeals, *infra*, at pp. A.8-A.13. The testimony in question appears at R.1425-R.1463, and supplemental rulings by the trial court, as to this issue, appear at R.1468-R.1474, R.1477.

(1)

This appears to be a case of first impression for this Court as to the use in evidence of computer produced conclusions for the purpose of proving guilt in a criminal case.

The potential application of computers in the search for truth is manifest. However, since computers are created, operated and instructed by men, they are subject to the

same mistakes and can create the same misapprehensions which cross-examination is meant to expose.

To a significant extent, the computer compounds the problems of the cross-examiner. As in this case, he is faced with a witness who testifies that:

a) raw information was accurately converted into a punched card medium and made understandable to the machine;

b) the machine is highly complex and possesses awesome capabilities, including the ability to tell its human guardians that the machine, itself, is malfunctioning;

c) the written program which told the machine what to do with the coded information on the punched cards, was properly formulated and properly processed into the machine;

d) the automatic print-outs which are offered in evidence as the product of the above procedures, accurately reflect what the witness says they reflect.

Of course, all of these constitute conclusions of the witness, in whose self-interest it is to so testify.

Separate and apart from the reliability of the process, the use of such highly sophisticated equipment may inordinately impress, if not overwhelm, a jury of laymen, and provide an undue aura of credibility to all of the evidence offered by the same side.

Assuming that the witness has done his homework and knows the answers which will provide a *prima facie* admissibility for the computer proofs, the only weapon with which the cross-examiner can test those answers is analysis of, and cross-examination concerning, the accuracy of the information and instructions given to the computer. In

the present case, those tools of cross-examination were denied to the defense.

It should be noted that this case does not involve the admissibility of computer records under the business records exception to the hearsay rule.* Likewise, there was no stipulation as to the accuracy of the computer results.**

In aid of the Court, we have reproduced as Appendix E hereto certain extracts from the text, *Law and Computers in the Mid-Sixties* (1966, Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association) (*Infra*, pp. A.25-A.28).

(2)

It is clear that the use of the computer-produced evidence was a complete surprise to the defense. It is also clear that the defense persistently requested access to the underlying computer programs for use in cross-examination of the computer expert, and that the trial court refused such access.

While acknowledging that the programs should have been supplied to the defense, the opinion of the Court of Appeals indulges in some tortuous reasoning to conclude that a new trial is not required. First, the opinion criticizes the defense for not adequately making known to the trial

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* *See: Transport Indem. Co.* v. *Seib*, 178 Neb. 253, 132 N.W. 2d 871, 11 ALR 3rd 1308 (1965); *Merrick* v. *U. S. Rubber Co.*, 7 Ariz. App. 433, 440 P.2d 314 (1968); *Proof of Business Records Kept or Stored On Electronic Computing Equipment*, 11 A.L.R.3rd 1377 (1967); *Computer Print-Outs of Business Records and Their Admissibility in New York*, 31 Albany L. Rev. 61 (1967); *Computer Print-Outs as Evidence*, 16 Am. Jur. Proof of Facts 273.

** *See: State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, 154 F. Supp. 471, 497-498, discussed at 21 F.R.D. 502-503.

court the *ground* upon which such material should be furnished for cross-examination. Then, it overrules the initial defense contention, at trial, that the material was required to be produced under 18 U.S.C. 3500. Finally, without specifically reaching the Sixth Amendment confrontation, cross-examination problem, it appears to sustain the Sixth Amendment motion made to the trial court, but holds the denial to have been harmless error within the context of this case.

(3)

The Clarity of the Defense Motion

One can readily imagine the effect which the surprise use of computer-produced evidence had upon defense counsel. An examination of the record reveals their valient efforts to grasp the essentials of computer technology so as to discern how the rules of evidence were to be applied to the oversized sheets which the computer had spewed out as part of the prosecution's effort to convict their clients. Unfortunately, their classroom was a courtroom, and their teacher was an experienced prosecution witness who spoke his own technical language and who was not particularly interested in their education. The trial court was no better informed than defense, as illustrated by its own misunderstanding of what a computer program was (R. 1452, 1454-1455).

Nevertheless, it is clear that when the possible weak points of the computer process were revealed, the defense requested the opportunity to examine the computer programs for the purpose of cross-examining the expert. The expert was the last witness of the day. During his testimony, 18 U.S.C. 3500 was the ground advanced for the production of the programs. Immediately upon the resump-

tion of proceedings the following morning, the defense again moved for their production upon the same ground. When that was denied, the defense moved that the computer evidence be striken upon the ground that it was hearsay evidence and violated "the constitutional right of confrontation and cross-examination." (R. 1477).

We do not see how, under the circumstances, the defense could have been more clear as to what was wanted and why it was wanted. Can a request under section 3500 be other than for reasons of cross-examination? Can a direct statement of the Sixth Amendment rights be other than the plain meaning of its words? We respectfully refer this Court to the testimony in question (R. 1425-1463, 1468-1474, 1477).

The Argument Under 18 U.S.C. 3500

Without saying why, the Court of Appeals has held our argument for production under 18 U.S.C. 3500 to be "wholly without merit" (A.12).

Although computer language would have no meaning to a layman, it was no less a statement than anything written in the English language, i.e., it was a reduction of thought to symbols. The computer expert who testified at the trial had supervised the preparation of the written computer program; he authorized its use; and, by his testimony at trial he attested to the truth of its contents (R. 1462-1463). How, then, did that program not fall within the following Section 3500 definition of "statement":

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement

made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." 18 U.S.C. 3500 (e)

Admittedly, there is no case in point, and Congress did not make specific mention of computer language as a means of communication, but, then, it did not make reference to any particular type of language at all.

In noting that Section 3500 is not "the Magna Carta of the right to production", the Court of Appeals failed to take into consideration the mandatory nature of subsections (b) and (d) which require that such statements be delivered to the defense, or in the alternative, that the testimony of the witness be striken, unless the more drastic remedy of a mistrial is required.

The violation of the requirements of that statute require a reversal of the convictions herein. *Campbell* v. *United States*, 365 U.S. 85 (1961); *Killian* v. *United States*, 368 U.S. 231 (1961); *Campbell* v. *United States*, 373 U.S. 487 (1963).

The Sixth Amendment

As already noted, the Court of Appeals appears to have sustained our argument as to the lack of confrontation and cross-examination, but does not explicitly allude to a violation of the Sixth Amendment.

As the facts already detailed reveal, the defense and the jury were presented with the bare conclusions produced by a computer. If a human being had been instructed to perform an investigation in a certain way and had reported the results of his investigation to his superior, the superior would hardly be competent to testify concerning those results, but that is precisely what happened in the present case. We do not suggest that a computer can be cross-

examined *directly*. It should, however, be the burden of the prosecution to establish 1) that the machine was operating correctly, i.e., that it did what it was told to do; and, 2) exactly what the computer was told to do. The only way this can be established is through a so-called computer expert. If the computer expert is permitted to carry conclusions into court and drop them before the jury without the possibility of a searching inquiry, then the right to confrontation and cross-examination is meaningless. In essence, the violation of the Sixth Amendment is no different than that in *Pointer v. Texas*, 380 U.S. 400 (1965); *Bruton v. United States*, 391 U.S. 123 (1968), or *Barber v. Page*, 390 U.S. 719 (1968).

The Error Was Not Harmless

In contrast to the Government and the trial court, the opinion of the Court of Appeals makes light of the value of the computer testimony (A.12-A.13). At trial the Government emphasized the importance to its case of the computer testimony at the time it was offered (R. 1430) and in summation to the jury (R. 3463, 3467). Likewise, the Court refused to sustain objections which charged that the evidence was cumulative and not probative (R. 1429-1431, 1456, 1457-1458).

More to the point, however, the issue is not what the Court of Appeals thinks the evidence was worth in fact, but, rather, what impact it had upon the jury. It cannot be seriously contended that the jury ignored this evidence in reaching its verdict. Having heard the wonders of this machine and its operator, they could naught but be awed by the conclusions which had been reached through the expenditure of much time and effort. Are we to presume that they concluded that their government had done all this

solely for the purpose of producing a "quite unnecessary frill." (A.13).

The Court of Appeals states that the computer simply revealed what was never seriously contested, i.e., that First National had used Consumers' inventory. The opinion contends that the real issue was intent.

As is shown in our Statement of the Case, and as verified by the prosecutor's argument to the jury (R. 3463, 3467), the Government's purpose, in resorting to a computer, was to establish that the defendants must have used far more raw materials in producing the products sold by them, than could be accounted for by an analysis of the raw materials they purchased. If a wide differential could be established which was substantially greater than the amount of Consumers' inventory that they admitted using, then the Government would have a basis to argue, as it did, that the defendants were lying as to the amount of inventory they had received from American. Once that was established, the conclusion of criminal intent was sure to follow in the minds of the jurors.

The question was not whether the inventory had been used, but, rather, how much had been used. For practical purposes, the issue of quantity and the issue of intent were one and the same. Not being able to reach into the minds of the defendants, the jury had to rely upon the circumstances presented at trial in order to determine intent. The computer "testified" that, within six days, the defendants had used the full amount of inventory that the Government claimed had been returned by American. It both corroborated and added to the testimony of FBI agent Lonergan, and directly contradicted the testimony of defendant-witness Plumeri.

Taking another approach, the Court of Appeals asserts that the sought after computer program "must have been one of utmost simplicity", "defense counsel must have realized" this, and "defense counsel could easily have checked the correctness of the computer's performance by adding machine or even manually, as the Government had itself done in one instance." (A.12). We are, frankly, puzzled by these assertions, which appear to be grounded upon sheer speculation. In its "one instance" the Government took a test deck of IBM punch cards, containing the coded information from a limited number of the invoices, and ran the deck through the programmed computer. They then took the result and compared them with computations made on an adding machine, to verify the results. We were possessed of neither a test deck nor a programmed computer. If the whole of the computations could easily have been done on an adding machine, then the extensive work done by the Government in creating the computer printouts was truly senseless. We respectfully submit that the speculations of the Court of Appeals must fall to the realities of the situation.

To say that the computer merely added and subtracted is only to describe what all computers do (see material collected in Appendix E, infra, particularly at A.25).

In view of the highly incriminatory nature of the computer proofs, it cannot be said that the denial of confrontation and cross-examination was harmless beyond a reasonable doubt. For that reason, the conviction herein should be reversed. *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

The Fifth Amendment

If, as the opinion of the Court of Appeals suggests, the computer evidence was "a quite unnecessary frill", then the

Petitioner fell victim to a highly prejudicial example of prosecutorial showmanship. As we have already pointed out, the jury could not help but to take the Government's proof seriously. Although we do not find a precedent in point, we respectfully submit that the exaggerated importance given to the computer evidence violated the Fifth Amendment guarantee of due process of law.

POINT II

It was a denial of Fifth Amendment due process and of the Sixth Amendment right to confrontation for the Court to permit two unsworn prosecutors to advise the jury both as to the fact that they had a private conversation with a key prosecution witness, and as to the prejudicial content of that conversation.

This issue is dealt with in our Statement of the Case, *supra*, at pp. 21-25, and in the opinion of the Court of Appeals at A-6-A8.

By a situation of their own creation, where the prosecutors cornered their own lead witness during a luncheon recess in the midst of his testimony, and accused him of deliberately falsifying his testimony to the benefit of the defendants, the prosecutors were later obliged to advise the court that the witness had not told the truth when questioned about the incident during cross-examination. Notably they waited until cross-examination and redirect examination were completed before they did so.

Faced with this revelation, the defense was certainly in a quandry. The witness had either lied or had a mistaken recollection. Would it be prejudicial to the defense if the content of that conversation were revealed? Understandably, the defense sought to have the full facts brought out in the absence of the jury, before making that determina-

tion. At least, they wanted some time to confer as to the appropriate course of action it was clear that there would be ample time, since this was the first witness in a lengthy trial.

Arbitrarily, the court denied both requests, as well as the suggestion of the prosecutor that the information be elicited from the sworn witness who had made the misstatement in the first place. The court, with full knowledge as to what the prosecutors would say (but taking the chance that they might say more), directed them to give the jury their unsworn recollection of the fact and content of their conversations with the witness.

Aside from being an impeachment by the prosecution of its own witness, both as to the fact of the conversations, and as to the facts of the testimony about which they had criticized him, the prosecutors' statements constituted unsworn testimony, without the benefit of cross-examination, containing rank hearsay and opinion. That it violated the right of confrontation guaranteed by the Sixth Amendment, is made clear by this Court's opinion in *Parker* v. *Gladden*, 385 U.S. 363 (1966).

It will be recalled that *Parker* involved a bailiff who made improper remarks to a trial juror concerning the disposition of the case. There, this Court said:

> "We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment made applicable to the States through the due process clause of the Fourteenth Amendment. It guarantees that 'the accused shall enjoy the rights to a * * * trial, by an impartial jury * * * (and) be confronted with the witnesses against him * * *'. As we said in *Turner* v. *State of Louisiana*, 379 U.S. 466, 472-473, 'the evidence developed against a defendant shall come from the witness stand in a

> public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross examination and of counsel.' Here there is dispute neither as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross examination or other safeguards guaranteed to the Petitioner. Rather, his expressions were 'private talk' tending to reach the jury by outside influence." 385 U.S. at 364-465.

No meaningful distinction can be made between *Parker* v. *Gladden* and the present case.

In attempting to justify the trial court's course of action, the Court of Appeals refers to the so-called "principle of completeness" mentioned in 7 Wigmore, Evidence §§ 2094, 2097 (3d ed. 1940) (*infra*, p. A.8). A careful reading of Wigmore reveals to us nothing which would justify the procedure followed here. The Court of Appeals advances this principle as being necessary, ". . . so as to rebut, for example, any inference that the prosecutors had urged Alpert to lie." (*Ibid.*) As the testimony stood, at that point, there was no such inference that could be drawn. Alpert had denied any conversation about the case, and that was it. By virtue of the prosecutors' unsworn statements to the jury, however, there was an inference which could be drawn, and that inference was to the prejudice of the defendants. The jurors could reasonably believe, from the content of the corridor conversation, that the witness had falsified his direct testimony at the behest of the defendants, or, at least, that the prosecutors believed this to be the case.

Thus, in a matter which may well have required a close and possibly censorious judicial scrutiny of prosecution conduct, the ultimate result was, instead, to depict the prosecution to the jury in a light of magnanimity and virtue.

Cf. *Standards Relating to the Prosecution Function*, §§ 3.1, 3.2, 5.7, 5.8, American Bar Association Project On Standards For Criminal Justice.

POINT III

In this conspiracy trial, where a codefendant testified in behalf of the defense, the Petitioner was denied due process by the trial court's unfair disparagement of the codefendant's testimony:

(A) The Court improperly prohibited and commented upon the codefendant's attempt to directly deny the charge of the indictment;

(B) The Court pointedly, unnecessarily and at length singled out the codefendant as having a motivation to lie under oath since he had an interest in the outcome of the proceeding.

The factual support for this point is found in our Statement of the Case, *supra*, at pp. 26-29. Although these issues were raised in the Court of Appeals, the Court's opinion does not deal with them.

A. The right to deny the elements of the charge.

The right of a defendant to address himself to the charges against him is basic to an American trial. This court has said:

> "Whenever one is assailed in his person or his property there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876).

That right is guaranteed by the Sixth Amendment of the United States Constitution and by Congressional direction, 18 U.S.C. 3481.

In those crimes where the essential element to be proven is intent, the only witness who can swear to the state of the defendant's mind, is the defendant himself. The divergent views, as to the permissibility of a defendant's giving such testimony, are concisely set forth by Dean Wigmore:

> "Under the influence of some obscure suggestion, not easily traceable, the view has been often urged upon Courts that a person — especially a party — should be disqualified from *testifying to his own intent* or motive, even where that intent or motive is material to be investigated.
>
> "The argument is (so far as any has been vouchsafed) that such testimony may be falsified without the possibility of detection, and that therefore it is dangerous to permit an interested person to allege, in effect, whatever he pleases as to his own state of mind.
>
> "The answers to this argument are various and sufficient. In the first place, there is no precedent for it in the inherited common law; it is an attempt to create a rule without an analogy in the accepted doctrines of the judicial rulings. In the next place, it assumes that there is no counter-evidence available, and yet asks that the only evidence which it assumes to be available shall be excluded, — in other words, asks that a concededly proper issue be submitted to the jury with no evidence at all. In the third place, its assumption is incorrect in fact, namely, that there is no other available and sufficient evidence of intent or motive by which the person's own testimony can be tested and checked: for the evidence from conduct and circumstances and from others' testimony is not only a permissible but

> a potent source of belief, and is amply sufficient to guard against falsification. Finally, the argument is at least of no higher value than the argument in favor of the unsatisfactory statutory rule against survivors' testimony. It is merely of a piece with all crude attempts to disqualify a witness by reason of interest, —attempts which to-day must stand discredited by the general repudiation of that species of disqualification." WIGMORE ON EVIDENCE (3rd Ed.) §581.

In *Walder* v. *United States*, 347 U.S. 62 (1954), which concerned the breadth of inquiry which is permitted in the prosecution's cross-examination of a defendant, this Court held:

> "* * * Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. *He must be free to deny all the elements of the case against him*, without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief." 347 U.S. at 65. [Emphasis added.]

See also: *Johnson* v. *United States*, 344 F.2d 163 (D.C. Cir., 1964), *Tate* v. *United States*, 283 F.2d 377 (D.C. Cir., 1960), *Poe* v. *United States*, 233 F. Supp. 173 (Dist. Col., 1964), aff'd, 352 F.2d 639 (D.C. Cir., 1965).

Explicit in this line of decisions is the right of the defendant to take the stand and deny, under oath, the full charge against him, as well as each of its essential elements. That right was denied and disparaged by the trial court in the present case.

The Court, on its own motion, immediately upon the co-defendant's denial of the full text of the conspiracy charge, announced that the question was "improper", and that the answer was "unnecessary", "a conclusion", and not "evidence". Thereafter, when the codefendant was asked if he

had knowingly and intentionally concealed the assets of the bankrupt, the Court branded his denial as a "conclusion." (*Supra,* p. 27).

By this remarkable conduct, coming at the most solemn moment of the man's sworn testimony in support of his innocence, the Court effectively destroyed whatever value the testimony might have had in the jury's consideration, and the codefendant was deprived of his right "to deny all the elements of the case against him." *Walder* v. *United States, supra.*

It is impossible to understand how the absolute constitutional and statutory right to call witnesses and to testify in one's own behalf can be vindicated or can survive effective destruction when a trial judge may be permitted to treat that right so cheaply, as, in effect, to sneer at the defendant's exercise of the right in its purest form, the sworn declaration of innocence. To call this testimony merely "conclusory", and to contrast it, invidiously, with "evidence", is indeed worse than to deny the right to testify. For, by treatment of the right in the way that was done here, the defendant (in his own behalf) and the witness (in behalf of his codefendants), who has voluntarily assumed the ordeal of subjecting himself to the jury's close scrutiny, has been denied the effective opportunity to swear to his innocence. We respectfully submit that this Court should not permit that right to be thus abridged.

B. The credibility of a defendant as a witness.

The opinion of then Circuit Judge Blackmun in *Taylor* v. *United States,* 390 F.2d 278 (8th Cir., 1968) reviews the authorities concerning the propriety of a court's charge as to the interest of a testifying defendant in a criminal pro-

ceeding. While upholding the instruction given in that case, the opinion makes the following significant statement:

> "We do not hesitate to observe, however, that the continuing and frequent attack on an instruction of this kind indicates that its use leaves defense counsel with a troubled mind. We suspect that this discomfort would be alleviated if the defendant were included by reference in the court's general instructions as to all witnesses. We would prefer that the defendant not be singled out. His interest is obvious to the jury. A general reference, such as 'including the defendant', should suffice. Or the simple instruction proposed by Mathes & Devitt, Federal Jury Practice and Instructions, §9.12 (1965), namely, 'A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness', might be considered for use and should withstand attack of the kind present here." 390 F.2d at 285.

Supra, at pp. 27-30 we have reproduced, in full, the trial court's instructions to the jury on the issue of credibility of witnesses. An examination of those instructions reveals:

(1) The defendant Plumeri, who testified in behalf of the joint defense, was the only witness to be singled out as having a motivation to commit perjury;

(2) The court dwelt at length upon Plumeri's credibility, far more so than the instruction under consideration in *Taylor, supra*.

(3) The court's language was in the most incisive terms possible, short of instructing the jury, outright, that the defendant probably committed perjury;

(4) The court deprecated Plumeri's testimony in no less than four separate ways: as an employee of the corporate

defendant; as a defendant himself, as one who had allegedly given prior inconsistent statements, and as one who had been convicted of possessing policy slips.

In any given case, as compared to the gross number of criminal cases, it is, at best, presumptuous to conclude that the defendant, in fact, has the greatest motivation to lie. Can it be doubted that, in a substantial number of cases, law enforcement officers have reasons of great personal interest to lie? Can such interest be effectively probed by the defense? What of other government witnesses who are bound to justify their conduct (as, for example, the employee's of American in the present case), lest their positions *vis a vis* the defendant be reversed? In reality therefore, the *heavily weighted* charge, against the defendant-witness, has no more validity than most statistics which purport to give an average.

We respectfully submit that the presumption of innocence which ought attach to a defendant in a criminal case is effectively nullified by such instructions to a jury. By exercising his right to testify, the defendant-witness has effectively waived that presumption. Moreover, such instructions may well be considered as an inducement for the unwarranted indictment, as codefendants, of persons who might otherwise give favorable testimony in behalf of a defendant.

When the court's charge is taken together with the court's refusal to permit, and observations upon, Plumeri's attempt to deny guilt, we believe that no other conclusion can be drawn than that the defense was unfairly deprived of any value Plumeri's testimony may have had for the jury.

POINT IV

Since the Petitioner had been notoriously and disparagingly publicized under an alleged alias, both in the matter on trial and in various unrelated matters, and, as found by the Court of Appeals, no purpose was served by reference to that alias, it was prejudicial error and inconsistent with the proper administration of justice in the Federal Courts for the trial court to deny defense motions that the alias be stricken from the indictment and not used at trial.

This problem is dealt with in our Statement of the Case, supra, at pp. 30-31, and in the opinion of the Court of Appeals, infra, at pp. 14-15.

It is fundamental to our system of justice that an individual be judged only upon evidence adduced at trial concerning the crime charged. In the present case, a substantial danger existed that the Petitioner would not receive a fair trial due to extensive allegations in the press which characterized him as being deeply involved in criminal activity.

The one advantage that the Petitioner had in hoping to overcome this adverse publicity was that press articles usually described him by the shorthand name "Johnny Dio"—an abbreviation which better satisfied the demands of headline space.

Prior to trial, the defense, clearly and specifically, moved that the alleged alias be stricken from the indictment and not used at trial. That motion was denied upon the Government's representation that "there are witnesses who will refer to him by that name." (R.4177).

The defense apprehensions, concerning the use of the alias, were confirmed during the voir dire of jurors, where it was made clear that the public associated the Petitioner's alleged criminal activities, not with his true name, but rather, with the alias that had been assigned to him by the press (supra, p. 31).

In its opinion, the Court of Appeals acknowledged the adverse publicity connected with the alias, and also acknowledged that no basis existed for the use of the alias at trial. There was no witness who testified at the trial who required the use of the alias to identify the Petitioner, and there was no evidence of any type with which that alias was connected.

In upholding the needless use of the alias, the Court of Appeals inexplicably indicates that the defense was in some way to blame for the use of the alias before the jury. The fact is that since the motion to strike the alias had been denied, the defense was bound to request that the Court interrogate the jurors as to their familiarity with that alias.

The opinion mischaracterizes the problem presented by the alias. In most situations, as illustrated by the cases cited in the Court's opinion, the difficulty presented by use of an alias, is that it may "arouse suspicion that the accused is a person who has found it useful or necessary to conceal his identity." However, that had nothing to do with the problem in this case. The problem here was that the alias was demonstrably associated by the public with an individual alleged to be a notorious criminal.

The simple expedient of not using the alias would have substantially diminished the likelihood that the Petitioner would be tried upon his reputation, rather than upon the facts adduced at trial. We respectfully submit that the

trial court's failure to grant the defense motion, did violence to this Court's holdings in *Patterson* v. *Colorado*, 205 U.S. 454, 462 (1907); *Chambers* v. *Florida*, 390 U.S. 227, 236-237 (1940); *Bridges* v. *California*, 314 U.S. 252, 271 (1941); *Marshall* v. *United States*, 360 U.S. 310, 312-313 (1959); *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961); *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966).

If anything, the very process by which the defense was required to attempt to exclude potential jurors who admitted knowledge of the alias, simply compounded the prejudice.

In essence, we are asking this Court to hold that the clearly unnecessary, but intentional exposure of the jury to information about a defendant which has the unquestionable, but immeasurable, potential to destroy the jury's objectivity, violates due process and is inconsistent with the proper administration of justice.

CONCLUSION

For all of the above reasons, the writ of certiorari should be granted.

Respectfully submitted,

JOSEPH E. BRILL,
Attorney for Petitioner

JOSEPH E. BRILL,
HENRY J. BOITEL,
JOHN L. POLLOK.

June 22, 1970.

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 171—September Term, 1969.

(Argued April 21, 1970 Decided May 27, 1970.)

Docket No. 32043

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN DIOGUARDI, a/k/a Johnny Dio, THOMAS PLUMERI, DAVID PERLMAN and FIRST NATIONAL KOSHER PROVISIONS, INC.,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and SMITH,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Walter R. Mansfield, *Judge*, convicting defendants, after a verdict, of offenses against the bankruptcy laws, 18 U.S.C. §§152 and 371. Affirmed.

OTTO G. OBERMAIER, Special Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, Jay S. Horowitz and

Paul B. Galvani, Assistant United States Attorneys, of Counsel), *for Plaintiff-Appellee.*

Jerome J. Londin, Esq. (Joseph E. Brill, Esq., New York, New York, of Counsel), *for Defendants-Appellants John Dioguardi, Thomas Plumeri and First National Kosher Provisions, Inc.*

Jacques M. Schiffer, Esq., Rockville Centre, New York, *Attorney for Defendant-Appellant David Perlman* (John L. Pollok, On the Brief).

Friendly, *Circuit Judge:*

Defendants were charged with the substantive crimes of fraudulently transferring and concealing the property of a bankrupt in contemplation of bankruptcy, and of fraudulently concealing the bankrupt's assets from the trustee in bankruptcy in violation of 18 U.S.C. §152, and a conspiracy to do the same, 18 U.S.C. §371. In 1967, after an 18 day jury trial in the District Court for the Southern District of New York, they were convicted on all three counts. We affirm.[1]

I.

The bankrupt, Consumers Kosher Provisions, Inc. (Consumers), was under the effective control of defendant John

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[1] The two and a half year lapse since conviction was due in large part to the necessity for remanding the case, in March 1968, at the request of the Government, for a hearing with respect to electronic surveillance. The district court held proceedings in abeyance pending the Supreme Court's decision in *Alderman* v. *United States*, 394 U.S. 165 (1969). It then found, after hearing, that the convictions were not affected by a single unrelated instance of electronic surveillance of appellant Dioguardi. We find no fault with this determination.

Dioguardi. Defendant David Perlman had the title of president and defendant Thomas Plumeri was an important employee. In the summer of 1964, while Consumers was experiencing serious financial difficulties, Dioguardi negotiated a contract with American Kosher Provisions, Inc. (American), a successful competitor. The contract, dated August 15, 1964, provided that American would purchase all Consumers' stock, represented to be 72½ shares; assume its obligations, including five-year employment contracts with Dioguardi and Perlman; and take over operations pending the closing, which was to be not later than October 27. When the parties met that day, Consumers' attorney, J. Jack Brown, failed to produce a certificate for the 27½ shares owned by the estate of Herman Rose, whose executrix had signed the contract; Brown claimed he had not had sufficient time to qualify her. It also turned out that, in addition to the 72½ shares specified in the contract, there were another 27½, owned by Morris Meat Market, Inc. Brown suggested that since all the officers, directors and stockholders of Morris were present, the shares could be transferred at that time although Morris' financial records indicated this might render it insolvent.

American's counsel naturally refused to permit his client to close. Two officers of American, Alpert and Krutchik, said that creditors of Consumers had been holding off pending the closing; that under the circumstances they would not consent to an extension; and that the following morning the creditors would be notified the deal was off. Alpert instructed Krutchik to take an inventory, with a representative of Consumers, and return the Consumers property located at its own plants. After complications unnecessary to detail, in which all three defendants were involved, the

inventory was completed in the early morning hours of October 29, and defendant Plumeri gave a receipt for the goods. Later, American inventoried and returned the Consumers property that had been at American's plant; receipt of this property was also acknowledged by Consumers. According to American's recapitulation, the total property returned amounted to $32,452.57, valued at cost: Raw meat, finished and semi-finished products accounted for $10,071.54, and supplies, such as spices, casings, boxes and other containers, made up the balance.

Toward the conclusion of the inventory taken on October 29, Dioguardi told American's general manager that he was going into business under the name of First National Kosher Provisions, Inc. (First National), a hitherto inactive corporation he controlled. Operations were conducted in Consumers' plant and with its leased trucks. New books were opened and First National's name was substituted on Consumers' invoices and sales tickets. To obtain working capital, defendant John Dioguardi, along with defendant Perlman and attorney Brown, obtained from one Sol Licliter a $10,000 check to Dominick Dioguardi, payment of which John Dioguardi guaranteed. No note was given or time of payment specified, and the loan had not been repaid at the time of trial. This check and an additional $10,000 provided by John Dioguardi were used to open a First National account at the Central State Bank; Plumeri, Perlman and Dominick Dioguardi were listed as the corporate officers.

First National began business by utilizing Consumers' inventory; it had no other. The Government's evidence was that the entire Consumers inventory was so utilized.

Haberman, an accountant engaged by Dioguardi, called him and reported that First National's profit figures for November were "unduly" high; Dioguardi promised an answer. At a meeting with Haberman shortly thereafter, Dioguardi and Plumeri produced an invoice purporting to represent the total pounds of Consumers' meat that First National had used. The figure $5523, although well below actual cost, was then assigned as the value of the meat and Haberman said he would carry this as a liability to Consumers. His workpapers so showed it, but it was not carried into First National's financial statements. Later Dioguardi remarked to Haberman that the $5523 would be paid to Consumers when First National received a bill. It never did.

On January 25, 1965, three creditors filed a petition in bankruptcy against Consumers. It was later adjudicated a bankrupt and, on March 2, 1965, Herman Sommers was appointed trustee. In the interval defendants moved First National from Blake Ave., Brooklyn, to East 180th Street in the Bronx, taking some of Consumers' equipment and fixtures with them. These were ultimately discovered by the trustee and, together with the fixtures and equipment left at Blake Ave., realized $3500. Consumers' estate, with debts of over $265,000, had no other assets.

Although much dust was scattered over details concerning the amount and value of the inventory that was used, the theory of defense was that attorney Brown had sanctioned the use of Consumers' inventory and plant as a means of attempting to salvage something for Consumers' creditors, although the latter were never advised of defendants' intentions. Brown, whose testimony was re-

plete with inconsistencies, supported this to some degree. Plumeri was the only defendant to testify. Despite or perhaps partially because of this and other testimony adduced by the defense, it is apparent, without burdening this opinion with more detail, that the jury was abundantly justified in rejecting defendants' version and accepting the Government's theory that defendants deliberately aborted the closing with American and then helped themselves to Consumers' property. Appellants' contention of insufficient evidence thus borders on the frivolous, and we turn to claims of trial error.

II.

Alpert, of American, was the first Government witness. During the luncheon recess, the prosecutors mentioned to him in the corridor that he had omitted to testify to several facts he had previously disclosed. On recross examination that afternoon he denied having talked with the prosecutors during the recess, other perhaps than to ask when he could return to Miami. At the conclusion of redirect examination the prosecutors requested a conference at sidebar and revealed the conversation. The judge asked defense counsel whether they wished to bring this out and proposed as alternatives a statement by the prosecutors or further examination of Alpert. Counsel insisted on a hearing outside the presence of the jury, which the judge denied. The prosecutor said he would not object if defense counsel wished to ask Alpert whether it wasn't a fact that he had spoken to the prosecutors in the corridor. The judge urged defense counsel to cooperate "to the extent of advising whether you wish that revealed to the jury or

whether you think your clients would be in any way prejudiced by revealing it to the jury." When counsel declined, the court directed the prosecutors to tell the jury what had occurred.

The leading prosecutor then stated to the jury that, contrary to Alpert's testimony, he had told Alpert during the recess that he thought the latter "had purposefully omitted important testimony, damaging against the defendants, and that he sounded on cross-examination more like Mr. Brill's witness than the government's witness." He added that his associate had remarked about Alpert's failure to mention an offer by American to close if the sellers would furnish a surety bond for protection; the associate went into greater detail about this.[2] The judge then asked Alpert whether the prosecutors' statements were true. Alpert answered he "would imagine it is substantially about what they may have said." Defendants' motion for a mistrial was denied and, after a few further questions by defense counsel, Alpert was excused.

We have some difficulty in understanding just what is claimed to have been wrong about this. The court could not leave the record with a lie by Alpert known to the prosecutors but not disclosed to the jury, unless defendants preferred to waive the point—which they were given an opportunity to do. If the criticism is that the prosecutors got before the jury not only Alpert's false answers but their belief that he had failed to give other damaging testimony, this was defense counsel's own doing; the prosecutor had offered to let them expose the prevarication

[2] The prosecution had already developed this in Alpert's redirect examination.

simpliciter. Moreover, if the episode was to be brought out, as defense counsel had forced it to be, the prosecution was entitled under the principle of completeness, see 7 Wigmore, Evidence §§2094, 2097 (3d ed. 1940), to bring out the whole conversation, at least in the absence of serious prejudice to the defendants, so as to rebut, for example, any inference that the prosecutors had urged Alpert to lie. We likewise fail to see why, on what he had before him, the judge was compelled to order a hearing outside the presence of the jury. The purpose of such a hearing would have been to assist defense counsel in making an informed tactical choice. But the judge was convinced, properly as matters turned out, that they had already heard all there was. The case would stand differently if the prosecutor had taken advantage of the situation by placing before the jury inculpatory material not disclosed at sidebar and not otherwise in evidence.

III.

A more serious point is the Government's failure to produce the program by which its witness Row had instructed a computer to prepare figures showing the dates when First National had exhausted the various items of Consumers' inventory turned over by American.

A previous witness, Lonergan, had calculated First National's purchases of raw materials and sales of finished products during the period from October 29 to November 26, 1964, and its inventory of both on November 27. He determined the sales to have amounted to 105,648 pounds and the inventory to 42,679 pounds, a total of 148,327 pounds. Purchases had been 108,475½ pounds. Deduction

of these left 39,851½ pounds that must have come from some other source, presumably Consumer's inventory, although this appeared to have been only 25,569½ pounds. Defendants had criticized Lonergan's data and computations on numerous grounds.

Row used as input data this figure of Consumer's inventory and Lonergan's tabulations of various slips showing First National's purchases of raw materials and sales of finished products. The computer was then instructed to determine the dates when, on the basis of first in, first out, Consumers' inventory would have been exhausted both for specific items and in gross; the answer to the latter was November 5. When the Government offered print-outs showing the computer's answers, defendants were granted an extensive *voir dire*.

The defense began by bringing out that Row had made no independent examination but had relied on Lonergan's work. Criticisms previously made with respect to that testimony were repeated, and it was contended that Row had ignored some of Lonergan's data. Mr. Schiffer, counsel for Perlman, moved to strike Row's testimony and to exclude his exhibits on these grounds. The motion was denied. Mr. Brill, representing the other defendants, then raised the contention that the program given the computer was producible under the Jencks Act, 18 U.S.C. §3500. The judge did not agree. Mr. Brill next went into more questions to bring out again that Row had not participated in the preparation of the underlying documents, and that the computation had been made on the principle of first in, first out. The prosecutor developed that in order to assure the accuracy of the computer's work, "a test deck was created

which would be a sampling of the information we have in this case, the tabulating cards, and they were run through the computer using the program, and then this was manually verified to make sure that the computer had come out with the right answers." After all this, court was adjourned at Mr. Brill's request to enable him to make motions the next morning.

When the court met, this time outside the presence of the jury, Mr. Brill referred to a motion of the previous day "with respect to the 3500 material," which he indeed had made, and "a motion upon the failure of the government to supply the programming material on the basis of which Mr. Row's testimony was given," which had not been made except insofar as he and Mr. Schiffer had raised the point of alleged absence of certain needed data. In answer to a question from the court concerning §3500, he went into an extensive argument on that score. Nothing more was said regarding the defense's right to the program quite apart from the Jencks Act. The judge denied the motions. Mr. Brill then asked that the program be marked as a court exhibit, as is commonly done with material held to be non-producible under the Jencks Act. The prosecutor denied having or having had it. Mr. Brill moved that the prosecutor be directed to obtain it; the court declined. Then, after having moved to strike the testimony and exhibits of Lichter and of the representative of the Central State Bank, some testimony of Alpert and much of the testimony of Sommers, Mr. Brill moved to strike Row's testimony and the print-outs on the ground "that this testimony is based upon the hearsay evidence of a mechanical or an electronic computer which was not itself subject to cross-examination, thereby denying the defendants the constitutional right of

confrontation and cross-examination. . . ." The court denied this. Motions to strike the testimony and exhibits of Lonergan and Krutchik were also denied.

We fully agree that the defendants were entitled to know what operations the computer had been instructed to perform and to have the precise instruction that had been given. It is quite incomprehensible that the prosecution should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired. We place the Government on the clearest possible notice of its obligation to do this and also of the great desirability of making the program and other materials needed for cross-examination of computer witnesses, such as flow-charts used in the preparation of programs, available to the defense a reasonable time before trial. See *United States v. Kelly*, 420 F.2d 26 (2 Cir. 1969). However, we do not believe the interests of justice require reversal of these convictions because of what occurred here.

To begin, we have the gravest doubt whether defense counsel made intelligible to the court what we deem their one meritorious point concerning the program, a point first clearly expressed in the reply brief in this court, namely "that without the 'program' it [the defense] could not properly test the validity of the results of the computer nor could it properly cross-examine Mr. Row." Although close scrutiny of the record we have summarized in what must have seemed tedious detail may enable one, reading with the benefit of hindsight, to glean the argument that the defense was entitled to check just what the computer had been asked to do, any suggestion of this was buried

in the avalanche of other arguments, especially the claim with respect to §3500. That claim was wholly without merit, as mere reading of the statute, let alone consideration of its purpose explicated in *Palermo v. United States*, 360 U.S. 343 (1959), plainly shows. Despite frequent judicial reminders, counsel cannot seem to understand that rather than being the Magna Carta of the right to production, the Jencks Act is a restriction on it in certain respects. It would thus be unfair to the trial judge and a waste of the time of another judge and jury for us to direct a new trial for failure to compel production of the program unless there is an appreciable risk that prejudice resulted. We do not believe there is, for a number of reasons.

The instruction here given the computer must have been one of utmost simplicity, as defense counsel must have realized—to start with the opening inventory, sum up the purchases and sales for each day, subtract the latter from the opening inventory, and repeat the process until the opening inventory was exhausted—in this case six times. Moreover, and more important, the data were so limited that defense counsel could easily have checked the correctness of the computer's performance by adding machine or even manually, as the Government had itself done in one instance.[3] To be sure, that would not be a sufficient answer

[3] This would have taken very little more time, if any, than it took the Government to use the computer. The key-punch operator had to punch a card for each slip, recording the item, quantity, date and whether it was a purchase or sale. The computer then processed this information in accordance with the program. Similarly, if an adding machine were used, only one entry per slip would have been necessary. The only discernible difference is that manual sorting of the slips according to date, item, and type of transaction would have been required before the adding machine operator could begin. Given the limited number of entries, this difference is hardly significant.

if the trial had ended shortly after Row's testimony and there now appeared to be any real likelihood that the computer might have failed in its simple task. But neither of these contingencies exists. The trial lasted for another ten days; defense counsel thus had ample opportunity to check the computer's performance or, for that matter, to renew their demand for production of the program, or request a subpoena, in a more readily understandable way. Even now, two and a half years after the trial, we are pointed to no error in the computer's calculations. Finally, Row's testimony was a quite unnecessary frill. It was not really disputed that First National had made use of Consumer's inventory; the controversy was whether the individual defendants intended to pocket the profit or pay Consumers for what First National had used. The precise date when Consumers' inventory would have been exhausted on a first in, first out basis had only a peripheral bearing on that issue.

IV.

The only other contentions that warrant comment are a variety of claims that defendant Dioguardi was denied a fair trial because of his known association with organized crime.

The judge acted well within his discretion in denying motions for a continuance or change of venue. Many of the articles referring to the case were in publications having limited or no circulation in the Southern District of New York. With respect to others, which referred to Dioguardi's connections with the Mafia, we echo Judge Weinfeld's observations in *United States* v. *Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2 Cir.),

cert. denied, 375 U.S. 836 (1963), and our own in *United States* v. *Grassia,* 354 F.2d 27, 29 (2 Cir. 1965), *rev'd on other grounds,* 390 U.S. 202 (1968). We add the counsel of experience that transfer from a metropolitan area to a smaller city may result in more rather than less intensive publicity.

Judge Mansfield's examination of the jurors, far from being subject to valid criticism, seems to have been a model which other trial judges could utilize to advantage in cases of this sort—save in one particular. In examining at sidebar prospective jurors who had read or heard anything about any of the defendants in the case, the judge did not arrange to have the defendants close by. See F.R.Cr.P. 43. However, they were seated only 15-20 feet away; their experienced counsel, who had been earlier advised of the proposed procedure, did not ask that they be allowed to come nearer;[4] most of the jurors thus questioned were excused by the court; ample time was given for counsel to consult with defendants concerning challenges; and all the jurors whom the court had not excused were challenged either by the defendants or the Government.

The remaining point is that the indictment, which was sent to the jury over objection, described Dioguardi as "a/k/a Johnny Dio," the name by which he was often described in articles about the underworld; that the prosecutors asked two witnesses whether they knew Dioguardi by another name; and that on one occasion the court inadvertently referred to him as Mr. Dio. While we see no occasion for the Government's having inserted the added phrase in the indictment or for the prosecutors' questions,

[4] When the point was first raised, at the hearing on sentences, the judge stated he would have granted such a request.

since the witnesses all knew Dioguardi under his full name as well, see *United States* v. *Monroe*, 164 F.2d 471, 476-77 (2 Cir. 1947), *cert. denied*, 333 U.S. 828 (1948); *United States* v. *Grayson*, 166 F.2d 863, 867 (2 Cir. 1948); contrast *United States* v. *Miller*, 381 F.2d 529, 536 (2 Cir. 1967), *cert. denied*, 392 U.S. 929 (1968); *United States* v. *Valenti*, 74 F. Supp. 718 (W.D. Pa. 1947); *United States* v. *Melekh*, 193 F. Supp. 586, 595 (N.D. Ill. 1961), the defense itself had caused the Dio name to be brought before the jurors as a result of its claims with respect to pre-trial publicity. Moreover an abbreviation, unlike a true alias, does not "arouse suspicion that the accused is a person who has found it useful or necessary to conceal his identity." *United States* v. *Grayson*, *supra*, 166 F.2d at 867. It is thus even clearer than in *Grayson* that "the references complained of would not in our judgment even remotely tend to justify a reversal."

Affirmed.

SMITH, *Circuit Judge* (concurring):

Were this case at all close on the issue of whether First National used the bankrupt's assets with no intention of paying for them, I would be inclined to dissent on the ground that the computer program should have been produced in spite of the erroneous reliance on section 3500 in the request for it. But I agree that there was no real dispute on the issue of the use which was affected by the accuracy of the computer, and concur in the affirmance of the judgment.

APPENDIX B

Judgment and Commitment
(U.S.A. v. John Dioguardi)

(4248)

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 66 Cr. 385

UNITED STATES OF AMERICA

v.

JOHN DIOGUARDI a/k/a Johnny Dio

On this 11th day of December, 1967, came the attorney for the government and the defendant appeared in person and by counsel

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty by a jury has been convicted of the offense of unlawfully, wilfully and knowingly, in contemplation of bankruptcy or with intent to defeat the bankruptcy law, transferred and concealing and causing to be transferred and concealed, property of the bankrupt, and concealing from the Trustee in Bankruptcy property belonging to the estate of the bankrupt. (Title 18, Sections 152 and 2 U.S. Code); and conspiracy so to do (Title 18, Section 371 U.S. Code.) as charged in three counts and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no suf-

ficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) Years on each of counts 1, 2 and 3 to run concurrently with each other.

The defendant is fined $10,000.00 on count 1 and fined $5,000.00 on each of counts 2 and 3, subject to the condition that the fines imposed on the respective counts shall not be cumulative, and that the total fine to be paid by the defendant shall in no event exceed $10,000.00 and the defendant is to stand committed until the total fine is paid or he is otherwise discharged according to law.

The defendant is continued on his present bail of $50,000.00 until 4:30 P.M. today to post bail pending appeal fixed in the sum of $100,000.00.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualfied officer and that the copy serve as the commitment of the defendant.

WALTER R. MANSFIELD
United States District Judge

JOHN J. OLEAR, JR.,
Clerk

APPENDIX C

Judgment of Affirmance of United States Court of Appeals

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of May one thousand nine hundred and seventy.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOHN DIOGUARDI, a/k/a JOHNNY DIO, THOMAS PLUMERI, DAVID PERLMAN and FIRST NATIONAL KOSHER PROVISIONS, INC.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of Affirmance of United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk.

APPENDIX D

Constitutional Provisions and Statutes Involved

UNITED STATES CONSTITUTION:

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix D—Constitutional Provisions and Statutes Involved

UNITED STATES STATUTES:

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bankruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy

law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

June 25, 1948, c. 645, 62 Stat. 689; June 12, 1960, Pub.L. 86-519, § 2, 74 Stat. 217; Sept. 2, 1960, Pub.L. 86-701, 74 Stat. 753.

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 3500 Demands for production of statements and of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony

of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Added Pub.L. 85-269, Sept. 2, 1957, 71 Stat. 595.

APPENDIX E

The following extracts from *Law and Computers in the Mid-Sixties* (1966, Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association), provide some background for an understanding of the issue presented by Point I, *supra*, pages 32-41.

> "The significant thing about the digital computer is not its complexity. The poignant fact is that a computer is a very simple-minded device, at least if you break it down into small enough pieces. Its calculation ability is roughly parallel with elementary school arithmetic, and, by itself, the computer is perhaps at fourth grade level. It can add, it can subtract, it can divide sometimes, it can manipulate numbers, *but only under specific direction.* It has no imagination. It, for all practical purposes, is an obedient, fast, accurate moron. It does exactly what it's told, when it's told. If it's not told to stop it will continue forever. *If it's told to do the wrong thing, it will do the wrong thing forever or until it's told to stop. The art of using the computer is that of determining which operations it is to perform and in what sequence and on what information. That art is called programming. This is another subject, fully as complex as the makeup and function of the hardware.*" (at page 4) [Emphasis added]
>
> * * *
>
> "When a computer stops following rules, starts imagining, starts being creative, this is called a malfunction, and it's time to call the repairman. There is no room for creativity inside the computer. The creativity is left to the person who designs and builds it *and also to the man or woman who writes the program and operates the machine.*" (at page 6)
>
> * * *

"We have mentioned the command as the basic means for the programmer to communicate with the computer. The commands are structured into a software device called a 'program.' The program is a sequence of instructions or commands that tells the computer where to find its information in the outside world; where to put the information inside the computer so it can find it later, when it is finished putting in information; where to put its sequence of commands that constitute the program; when to start the sequence of commands that make up its program. ***" (at page 8)

* * *

"* * * Computers have an almost incredible accuracy and dependability. They will usually perform in the same way, under the same circumstances, when using the same computer programs. But one must be careful not to assume that this inherent accuracy carries over to the work that the computer performs. Most errors are due to the human element. Humans still write the programs, prepare the data, and they still operate the computer. * * *

"Now what are some of the things that the lawyer must consider with regard to these new types of records? The lawyer has to assure himself that the records he is using have been produced by a system that is free of human error. He has to do this before he can place reliance upon the records the computer produces. * * *" (at page 38)

* * *

"[H]ere is what the auditor faces when he considers the computer's effect upon his auditing function. First of all, he faces a new error enviornment in checking the reliability and accuracy of the finan-

cial data to which he certifies. The installation of the computer introduces the possibility of new types of errors. Some of these, however, are not too new because they are associated with the punched card itself. Say we have a source document; the equipment does not process the source document; because it cannot read it. Therefore, we have a conversion process whereby someone reads the information on the source document and then, by a manual-keying operation, converts it into machine-readible form on another document (either punched card or punched paper tape).

"[Y]ou cannot improve information by handling it over and over. If my balance is $100, no matter how many times I copy it, I cannot improve the quality of this $100. All I can do is 'deprove' it—maybe make it $1,000, possibly make it $10. Thus we have this first possible source of error, 'deproving' the figure by manual rehandling."

* * *

"[I]t's not the computer who's at fault. What you find instead is a human being making the mistake. Give a human something as wondrous as the computer, and you'll see a new, dramatic type of mistake—the kind of mistake that makes the headlines. Remember, these situations stem from a bug in the program. It is not the computer who ships every shipment for an entire day to the smallest customer, and then (I'm not dreaming this up) gives everybody four hours overtime. Maybe you think its impossible for the computer to charge a department store charge account with the customer's account identification number. These things can and do happen." (Pages 41-43).

LIBRARY
SUPREME COURT, U. S.

Nos. 308 and [illegible]

In the Supreme Court of the United States

October Term, 1970

John Dioguardi, petitioner

v.

United States of America

Thomas Plumeri and First National Kosher Provisions, Inc., petitioners

v.

United States of America

On petitions for writs of certiorari to the United States Court of Appeals for the Second Circuit

Brief for the United States in Opposition

[illegible]

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 308

JOHN DIOGUARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 315

THOMAS PLUMERI AND FIRST NATIONAL KOSHER PROVISIONS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (App. A to both petitions) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1970. The petition for a writ of certiorari in No. 308 was filed on June 22, 1970, and the petition

in No. 315 was filed on June 25, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in not turning over to the defense the program of instructions given to a computer to tabulate inventory.

2. Whether the details of a conversation between the prosecution aid a witness during a recess in the trial were properly disclosed to the jury.

3. Whether the trial court disparaged the testimony of petitioner Plumeri.

4. Whether the references to petitioner Dioguardi under the abbreviated name of Dio deprived petitioners of a fair trial.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of fraudulently concealing the property of a bankrupt in contemplation of bankruptcy, of fraudulently concealing the bankrupt's assets from the trustee in bankruptcy, both in violation of 18 U.S.C. 152, and of conspiring to commit the substantive offenses in violation of 18 U.S.C. 371. On December 11, 1967, petitioner Dioguardi was sentenced to imprisonment for five years and fined $10,000; petitioner Plumeri was sentenced to imprisonment for three years; and petitioner First National Kosher Provisions, Inc. was fined $10,000. The court of appeals affirmed.

The evidence is set forth in the opinion below (*Dioguardi* Pet. App. A). Briefly, it showed that petitioners Dioguardi and Plumeri had important roles in the operation of Consumers Kosher Provisions, Inc., a company in serious financial difficulties. In August 1964, American Kosher Provisions, Inc., a competitor, agreed to purchase all of Consumers' stock and assume all of its obligations. It also agreed to take over its operations pending the closing date of the sale (Gov't. Ex. 1). Upon the basis of this agreement, the creditors of Consumers withheld the invocation of various creditors' remedies (Tr. 445). On the closing date, October 27, all of Consumers' stock was not produced and American refused to consummate the purchase (Tr. 447–449). On October 29, 1964, an inventory of Consumers' property was made and property valued at approximately $32,000 was returned to Consumers (Tr. 613–617). On the same date, Dioguardi and Plumeri went into business as First National Kosher Provisions, Inc., utilizing Consumers' inventory, its plant and its leased trucks. The financial statements of First National never indicated that it had utilized a portion of Consumers' inventory or that it owed and money to Consumers or its creditors and First National never paid Consumers for the use of its property. When an accountant employed by First National noted that its profits were much too high, Dioguardi and Plumeri advised him that $5,523 of Consumers' inventory had been utilized by the company (Tr. 1017–1030, 1040–1045; Gov't. Ex. 29).

On January 25, 1965, three creditors filed a petition in bankruptcy against Consumers and eight days later it was adjudicated a bankrupt (Gov't. Exs. 22, 37). In March 1965, a trustee in bankruptcy was appointed (Tr. 1179–1180). At no time was this trustee informed that the inventory of Consumers had been transferred to First National and had been utilized by it (Tr. 1183, 1190).[1]

ARGUMENT

1. A government witness calculated First National's purchases, sales and inventory from the date it commenced business (October 29, 1964) through the first month of its operations (Tr. 1304–1325). A second government witness who had supervised a computer tabulation then testified that, according to the tabulation, November 5 was the date when First National would have exhausted Consumers' inventory (Tr. 1437–1438). Thereafter, the district court denied a defense request to require the government to produce the computer program—the electronic instructions given the computer to prepare the tabulations. The court of appeals pointed out (Dioguardi Pet. A12–13):

> The instruction here given the computer must have been one of utmost simplicity, as defense counsel must have realized—to start with the opening inventory, sum up the purchases and

[1] In the interval between the adjudication in bankruptcy and the appointment of the trustee, the petitioners moved First National from the old Consumers plant to another location and took some of Consumers' fixtures and equipment with them (Tr. 1173–1176).

> sales for each day, subtract the latter from the opening inventory, and repeat the process until the opening inventory was exhausted—in this case six times. Moreover, and more important, the data were so limited that defense counsel could easily have checked the correctness of the computer's performance by adding machine or even manually, as the Government had itself done in one instance * * *. Even now, two and a half years after the trial, we are pointed to no error in the computer's calculations. * * *

In these circumstances, as the court below concluded, there was no prejudicial error in failing to turn over the computer program to the defense. Nor is there any broad issue raised as to the circumstances under which a computer may be used as part of the process to determine guilt in a criminal case.

2. On recross-examination, government witness Sol Alpert falsely denied that he had spoken to the prosecution about the case during the luncheon recess (Tr. 559–560). Following a short redirect examination (Tr. 570–576), the prosecutors disclosed their conversation with the witness to the court and defense counsel (Tr. 577–578). As the court below points out in detail (*Dioguardi* Pet. App. A6–A8), when the defense refused to take a position about how the trial judge should advise the jury about the false denial, the trial court properly permitted the prosecution to reveal the details of the conversations (Tr. 577–586).

3. Petitioner Plumeri testified extensively on direct examination (Tr. 2197–2375, 2507–2642). Near the end of his direct examination, his counsel formulated a lengthy statement based on the language in the conspiracy count and asked, "Did you do that?" (Tr. 2638–2640). The court concluded that such a question was unnecessary since Plumeri had pleaded not guilty. It refused to permit an answer to that question. The claim that this ruling in some manner disparaged the extensive testimony of Plumeri lacks merit. The trial judge permitted Plumeri to answer a series of six shorter questions based on the language of the indictment (Tr. 2640–2642).

The court did not err in instructing the jury to consider Plumeri's testimony in light of his interest in the outcome of the case. Such instructions have been repeatedly upheld. See, *e.g.*, *Taylor* v. *United States*, 390 F. 2d 278, 284–285 (C.A. 8).

4. The indictment identified petitioner Dioguardi as "John Dioguardi, a/k/a Johnny Dio." The claim that the trial judge erred in not striking the name "Johnny Dio" from the indictment is fully answered by the opinion below. As there noted, the defense itself caused the Dio name to be brought before the jurors. There is no substance to the contention that petitioners were denied a fair trial by the references to this name during the trial.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JULY 1970.